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TO: Members of the Committee on Aging
FROM: Kevin Brophy, Director of Elder Law for CT Legal Services
RE: **S.B. 973, An Act Concerning the Determination of Undue Hardship for Purposes of Medicaid Eligibility**
DATE: February 24, 2011

I am the Director of Elder Law for Connecticut Legal Services, a non-profit legal aid agency and am here today representing the position of CT's Legal Services Programs. My testimony is submitted on behalf of CT's low income elderly & disabled clients, who need Medicaid to cover long term care services.

We support the concepts raised in SB 973 but are offering substitute language that more closely reflects the product of lengthy negotiations between the interested parties. It is crucial that the concepts raised in SB 973 are passed this session.

CT is required by federal law to have an undue hardship exception. This exception can apply when the state Medicaid agency imposes a penalty delaying eligibility for Medicaid long term care based on a transfer of assets deemed to be for the sole purpose of obtaining Medicaid eligibility. The adoption of an undue hardship exception provides protections for the elderly and disabled whose health or life is at risk without long term care. SB 973 also adds the existence of dementia or other cognitive impairment to the situations when waiving a penalty should be considered.

The Regulations and Review Committee rejected the Department of Social Services' (DSS) proposed regulations containing an undue hardship exception in June 2009. At that time, the Legislative Commissioner's Office stated that DSS's "undue hardship" proposal ... appears to be inconsistent with the undue hardship provisions of the federal DRA. In August of 2009, the chairs of the Regulations and Review Committee convened a meeting with representatives of DSS and other stakeholders, including Legal Services, the Elder Law Section of the CBA, the CT Association of Not for Profit Providers, and the Alzheimers's Association and requested that we meet to resolve our differences over the proposed regulations.

Attached is substitute language that better reflects the undue hardship agreement that was reached by all the stakeholders, including DSS. We have been communicating with LCO regarding this substitute language and will continue to confer with them to reach a final version. We believe that this effort will result in a proposal that mirrors the outcome of the months of negotiations between the parties mentioned above.

FACTS about **Medicaid Eligibility and the Undue Hardship Exception**

The federal Deficit Reduction Act (DRA) of 2005 required states to promulgate an undue hardship exception when determining Medicaid eligibility for long term care. This exception allows the state to not impose a penalty period for a disqualifying transfer of assets in certain situations.

Elders are currently subject to a “look back” period (as of February, 2011 it reaches 5 years) during which any gifts or transfer of assets can be considered made in order to become eligible for long term care coverage under Medicaid. The penalty imposed is ineligibility for Medicaid assistance for a certain period of time.

CT responded by implementing interim regulations that are so punitive that proving undue hardship is next to impossible and arguably in violation of the spirit of the law.

In June of 2009, the Regulations Review Committee rejected without prejudice, DSS’ proposed regulations (the interim regulations already in use) to implement the DRA. At the request of the Committee chairs, DSS, Legal Services, the CBA Elder Law Section, NAELA and representatives from the nursing home associations, started negotiations on the package of regulations. Those negotiations were ongoing until March of 2010 when agreement on 7 out of the 11 proposed regulations in question was reached. **Among the regulations where agreement was reached was the undue hardship exception.**

However, DSS withdrew the package of proposed regulations on September 30, pending a decision on an unsettled question of law concerning the treatment of annuities. Despite the fact that the annuities question only has implications for one section of the regulations, all of the regulations were withdrawn including those that had been agreed to.

We are proposing that the language that was agreed to regarding the undue hardship exception become statutory in an effort to expedite the implementation of this crucial provision.

Adding to the urgency to adopt these changes are cases where an individual is unable to determine or defend the intent of a transfer due to dementia or

FACTS about Medicaid Eligibility and the Undue Hardship Exception

Alzheimer's. In that situation, verifying the circumstances surrounding a transfer that occurred five years ago can be next to impossible.

The revised language would:

- Add specific protections to those being deprived of medical care such that their **health** would be endangered. Without this language an exception is only given if deprivation of medical care actually threatens one's **life**.
- Allows for an exception when long term care is needed but services are being denied by a facility or community-based provider because of the imposition of a penalty.
- Adds the existence of "dementia" or other "cognitive impairment" at the time of the Medicaid application, or at the time of the transfer, or exploitation of someone with a cognitive impairment that resulted in a transfer, to the situations where a penalty can be waived.

Without this proposed language, that was painstakingly negotiated and agreed to by all parties involved, low income clients will continue to be denied essential long term care services.

Proposed Substitute Language for SB 973

AAC the Determination of Undue Hardship for Purposes of Medicaid Eligibility

An Act Concerning The Determination Of Undue Hardship For Purposes Of Medicaid Eligibility

Be it enacted by the Senate and House of Representatives in General Assembly convened:

(Effective from passage)(NEW) Conn. Gen. Stat. Section 17b-261 is amended by adding new subsections (j) to (q) as follows:

(j) The Department of Social Services shall waive the imposition of a penalty period arising as a result of an assignment or transfer of property or assets either pursuant to subsection (a) of this section or subsection (a) of 17b-261a if the imposition of a penalty would create an undue hardship pursuant to 42 USC Section 1396p(c)(2)(D).

(k) For purposes of this section, "undue hardship" exists if the individual would be deprived of medical care such that his or her health or life would be endangered, or would be deprived of food, clothing, shelter or other necessities of life.

(l) The Department of Social Services shall not impose a penalty period based on a transfer of assets made by an individual or his or her spouse, if denial or discontinuance of payment for services would create an undue hardship, if the penalty period was not waived, under the following conditions:

- (i) The long term care facility or medical institution has notified the individual of its intent to initiate the individual's discharge due to non-payment; or
- (ii) The individual is receiving long term care home and community-based services being provided under a Medicaid waiver and the medical provider has notified the individual of its intent to terminate such home and community-based services due to the imposition of a penalty period resulting from a transfer of assets; or
- (iii) The individual needs long term care services and, due to a transfer of assets resulting in the imposition of a penalty period, either (i) a long term care facility has refused to accept the individual, or (ii) the home and community-based services provider has refused to accept the individual as a client; and

(iv) There is no family member or other individual or organization able and willing to provide care to the individual.

(m) Notwithstanding paragraph (l) of this section, the Department of Social Services shall not find undue hardship when (i) the transferor deliberately impoverished himself or herself to avoid paying for long-term care costs, or (ii) a transfer that resulted in a transfer-of-asset penalty was made by the individual's legal representative, or (iii) a transfer that resulted in a transfer-of-asset penalty was made by the record owner of a jointly-held asset.

(n) Notwithstanding paragraph (m) of this section, the Department of Social Services may find an undue hardship if the transferor

(i) suffered from dementia or other cognitive impairment at the time of application for medical assistance and cannot explain transfers that would otherwise result in the imposition of a penalty period; or

(ii) suffered from dementia or other cognitive impairment at the time of the transfers; or

(iii) was exploited into making the transfers, due to the dementia or other cognitive impairment; or

(iv) was exploited by the transferor's legal representative or by the record owner of a jointly-held asset who made unauthorized transfers.

(o) The Department of Social Services shall notify individuals applying for long term care services about the possibility of obtaining an undue hardship exception. This notification may be part of the preliminary decision notice that the Department of Social Services sends to the individual when it determines that he or she has made an improper transfer of assets resulting in a penalty period.

(p) The individual has fifteen (15) days from the date of the notice described in subsection (o) to claim undue hardship or to otherwise rebut the Department of Social Services's decision to impose a penalty period. The Department of Social Service shall grant an extension if the individual so requests, and shall grant subsequent requests if such requests are reasonable.

(ii) If the individual or the individual's authorized representative claims undue hardship or rebuts the Department of Social Services's preliminary decision to impose a penalty period, the Department of Social Services shall within ten (10) days from the receipt of such claim or rebuttal to send an interim decision notice to the individual stating that it is either upholding or reversing its preliminary decision

(iii) The notification described in subsection (o) informs the individual that:

(aa) the Department of Social Services is reversing its preliminary decision, and is not imposing a penalty period with respect to long term care services; or

(bb) the Department of Social Services's preliminary decision is upheld, and a penalty period is being established, during which Medicaid will not pay for long term care services.

(iv) If the individual does not claim undue hardship or rebut the Department of Social Services's preliminary decision to impose a penalty period, the Department of Social Services sends the individual a final decision notice regarding the penalty period at the time of the disposition of the Medicaid application. This notice contains all the elements of the preliminary notice, and a description of the individual's appeal rights. An individual who requests an administrative hearing as part of the appeals rights following a final decision regarding a penalty period may present a claim for undue hardship as part of such request, and such claim for undue hardship shall be accepted for review by the hearing officer.

(v) The Department of Social Services sends a final decision notice regarding the undue hardship/rebuttal issue at the time of the mailing of the notice regarding the disposition of the Medicaid application.

(vi) In addition to the procedures for claiming undue hardship set forth in subparagraphs a - e above, and notwithstanding the time limitations set

forth in those sections, an individual may file a claim for undue hardship within sixty (60) days after the individual receives a notice as described in paragraph B.1 above that may establish that the individual would be deprived of medical care such that his or her health or life would be endangered or deprived of food, clothing, shelter or other necessities of life if the penalty were not waived.

(q)(i) The individual or the individual's authorized representative may give permission for the long term care facility in which he or she is residing to file a claim for undue hardship on behalf of the individual.

(ii) If the long term care facility certifies, and the Department of Social Services agrees, that the individual is incapacitated and has no authorized or legally-appointed representative, family member or friend to act on his or her behalf, the long term care facility may request, on behalf of the individual, an extension of time to file a claim for undue hardship. In such cases, the Department of Social Services shall grant such extension to allow a representative to be authorized or legally appointed to act on behalf of the individual.

(iii) In addition to filing an undue hardship claim based on paragraph (q)(i) and (ii) of this section, the long term care facility may, with the consent of the individual or the individual's legally-appointed or authorized representative, present information on behalf of the individual and represent the individual throughout the above-referenced undue hardship claim process.

